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No. 87-1279

IN THE
Supreme Court of the United States
OCTOBER TERM, 1987

ALEXIA MORRISON, INDEPENDENT COUNSEL,
Appellant,

v.

THEODORE B. OLSON,
EDWARD C. SCHMULTS, and
CAROL E. DINKINS,
Appellees.

On Appeal From the United States Court of Appeals
For the District of Columbia Circuit

BRIEF OF THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS *AMICUS CURIAE* IN SUPPORT OF NEITHER PARTY

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This brief *amicus curiae* is filed with the consent of the parties, as provided for in the Rules of the Court.

INTEREST OF THE *AMICUS CURIAE*

The American Federation of Labor and Congress of Industrial Organizations is a federation of 90 national and international unions with a total membership of over 14,000,000 working men and women. The AFL-CIO, its affiliates and the members of its affiliates all have a strong interest in the continuing validity of enactments that are designed to insulate executive officers entrusted with

the responsibility of administering a particular statutory mandate from immediate political pressures and in that way to further the disinterested enforcement of the laws. We file this brief because a portion of the opinion below in this case calls into question the constitutionality of long-established institutional arrangements of this kind.

INTRODUCTION AND SUMMARY OF ARGUMENT

For the most part the constitutional challenges in this case to the Ethics in Government Act of 1978, 28 U.S.C. §§ 49, 591-598 ("the Act") are directed at the locus of decision-making under the Act: *viz.*, to whether the Act's conferral upon the Judiciary of the power to make certain governmental decisions is consistent with the constitutional provisions defining the tripartite structure of the federal government. Thus, for example, this Court is being asked to decide whether the Act's conferral upon an Article III court of the power to appoint an independent counsel (a) deprives the Executive Branch of its constitutional prerogative to make such appointments, and/or (b) allocates to the Judicial Branch a power the Judiciary may not assume consistent with its constitutional role. Similar questions are presented with respect to the Act's allocation to the Judicial Branch of a role in defining and supervising the task of the independent counsel and in the removal process.

It is *not* the purpose of this brief to address these questions all of which grow out of the unique institutional arrangements established by the Act. Rather, we focus on a question of a distinct nature that has found its way into this case, and that has sweeping significance for a wide variety of federal government agencies and offices that have been established by Congress to effectuate federal enactments: whether Congress may by statute impose a "good cause" limitation on the President's ability to remove a federal officer whose function is limited to implementing a particular statutory mandate.

The Act provides that an independent counsel "may be removed from office, other than by impeachment and conviction, only by the personal action of the Attorney General and only for good cause, physical disability, mental incapacity, or any other condition that substantially impairs the performance of such independent counsel's duties." 28 U.S.C. § 596(a)(1). The court below found that, wholly apart from the role the Act gives the Judiciary in the appointment and removal processes, this "good cause" limitation is an unconstitutional restriction on the presidential power. Pet. App. 43a-53a.[1] In the view of the court below, Article II of the Constitution confers upon the President the power to remove at will any "'pure' executive officer." The court found the independent counsel to be a "'pure' executive officer" (Pet. App. 50a), and concluded, accordingly, that Congress may not by statute adopt standards that limit the circumstances in which the President may remove that officer. Pet App. 43a-53a. It is this ruling that we address in this brief.

In contrast to *Bowsher v. Synar*, 106 S. Ct. 3181 (1986), *Buckley v. Valeo*, 424 U.S. 1 (1976), and *Myers v. United States*, 272 U.S. 52 (1926), this issue, we emphasize at the outset, does *not* involve the claim that one branch of the federal government is engaged in the direct performance of functions assigned by the Constitution to another branch. *Bowsher* and *Myers*, for example, involved assertions by Congress of the right directly to participate in the removal process of executive branch officers. *See Bowsher*, 106 S. Ct. 3081, 3187-3188 & n.4. Here, by contrast, the issue is simply whether Congress,

[1] The court of appeals correctly saw no constitutional infirmity in the statute's vesting of removal authority in the Attorney General alone, rather than directly in the President. Since the Attorney General is the head of an Executive Branch Department, responsible directly to the President, the President can be said to be acting through the Attorney General. Pet. App. 18a, n.17. See *Ponzi v. Fessenden*, 258 U.S. 254, 262 (1922).

acting wholly within its legislative sphere, may, for legitimate public purposes, enact standards for the removal of executive officers that govern the President in effecting a removal.

It is plain that Congress acts well within its Article I powers when, in passing a statute, the Legislature creates executive offices to administer the enactment and defines the qualifications for those offices and the conditions for removal from those offices. The controversy here thus comes down to whether this undoubted congressional power is somehow limited or overridden by the requirements of Article II.

In the instant case, the executive officer in question has no duties except to carry out a particular statutory mandate, and the President (through the Attorney General) may remove that officer for any reason that "substantially impairs the performance of [those] duties." The lesson we draw from the analysis that follows is narrow and straightforward: at least in the case of executive officers whose duties are limited to implementing the acts of Congress, Congress may adopt a "good cause" standard to limit the President's ability to remove such officers. While the President's constitutional power may grow (and Congress' power to delimit grounds for removal correspondingly may diminish) as the range and nature of an executive officer's responsibilities expand, this case presents no occasion for exploring this more difficult terrain.

We recognize that there may well be executive branch officers—the Secretary of State and the White House Chief of Staff come to mind—as to whom the President does have an absolute power of removal at will. But it is at least equally clear that according the President a broad constitutional power of at-will removal infringes the power of Congress to carry out the legislative responsibilities conferred in Article I. In particular, where Congress determines that the public interest would be

best served through implementation of a given statutory scheme by officers insulated from the influences of immediate political pressures, Congress would be disabled from using limitations on removal as a means to accomplish this obviously legitimate objective.

As we show in this brief, the definition of "'pure' executive officer" employed by the court below gives to the President as a matter of constitutional prerogative an at-will removal power that is far too broad. In this respect, the decision below does not serve the constitutional scheme of separation of powers, but instead infringes on the ability of Congress to legislate in furtherance of legitimate public interests and grants to the President an unlimited power not provided by the Constitution. And the adverse consequences of this aspect of the decision below extend well beyond the immediate parties to this case. The decision wrongly casts into doubt a wide variety of existing and important institutional arrangments.

ARGUMENT

1. *The Constitutional Text.* The question of what limits Congress may by statute place on the President's ability to remove an executive officer is not answered *in terms* by the text of the Constitution or by any of the contemporaneous materials that sometimes throw light on the intention of the Framers. However, the constitutional text provides the principles that govern resolution of this question.

a. The place to begin is where the Constitution begins: *viz.*, with the role of Congress. Does Article I of the Constitution empower Congress to enact statutory standards limiting a President's ability to remove some or all officers of the Executive Branch? If the answer is in the negative, the inquiry need not proceed further. If the answer is in the affirmative, then it is necessary to confront the question whether this legislative authority

is overridden or limited by any other provision of the Constitution.

The authority to legislate standards governing the process for removing executive officers seems well within the terms of the legislative power vested in Congress by Article I. Section 8, cl. 18 of that Article grants to Congress the power:

> To make all laws which shall be necessary and proper for carrying into *execution* the foregoing powers, *and all other powers vested by this Constitution in the government* of the United States, *or in any department or officer thereof.* [Emphasis added.]

These words affirmatively cover, rather than exclude, laws directed to the Executive Branch. By this clause, Congress is authorized to enact laws governing the manner and means by which the Executive is to carry out the responsibilities entrusted to that Branch by the Constitution or by statute. Certainly, as a matter of English usage an enactment specifying the standards for removing a federal officer entrusted with carrying out federal law is a law "for carrying into execution . . . powers vested by this Constitution in the government of the United States, or in any department or officer thereof." And this understanding of the Constitution's words has been acted on from the beginning. Pursuant to this clause, Congress has in fact established the executive offices, defined their structures, functions and duties, set the qualifications for the appointment of executive officers *and* determined the standards under which those officers may be removed.

b. The question as to the nature and extent of Congress' power to legislate respecting standards for removal of executive branch officers thus reduces to whether Article I's *express* grant of authority is somehow limited by an overriding grant of authority to the President. And any such grant must be implied: *nothing* in the Constitution expressly states that the President must have the power to remove at will officers of the Executive Branch.

The absence of an express constitutional limitation on Congress' ability to legislate restrictions on the President's ability to remove executive officers is not, of course, necessarily conclusive. It is appropriate to ask whether such a limitation should be implied from some general grant of authority to the President. In this regard, two aspects of the grant of executive power in Article II bear investigation.

First, Article II, § 3 provides that the President shall "take care that the laws be faithfully executed." This provision places upon the President ultimate responsibility for execution of the laws, and may be assumed to require that Congress not deprive the President of the means to carry out his constitutional duties. It is certainly arguable that if, in a given instance, the President lacks sufficient control of an executive officer charged with particular law execution responsibilities, the President will not be able to satisfy his Article II, § 3 responsibiilty.

Second, Article II, § 1 vests "the executive power" in a single executive. The Framers rejected the notion of multiple executives in significant part because the fragmentation of executive power would make it too difficult to hold anyone politically accountable for the exercise of the executive power. See The Federalist No. 70 (A. Hamilton) (J. Cooke ed., 1961)); see also, Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 Colum. L. Rev. 573, 599-601 (1984). If the President were deprived of control over an officer with law execution responsibilities, the result arguably could be a fragmentation of executive power and a loss of political accountability.

In assessing whether these concerns come into play in this case, it is important to be clear both about the nature of duties of the executive officer here and about the substance of the limitation here on the President's ability to effect a removal.

The independent counsel's sole charge is to carry out the mandate of a particular statute, the Ethics in Government Act. This mandate was created, defined and limited by Congress in pursuit of valid legislative goals through the legislative process (in which, of course, the President played his full constitutional role). The task of the independent council is only to execute the will of Congress as expressed in this statute.

Part of the will of Congress is that the independent counsel should carry out her work with a measure of insulation from the pressures of short-term political influences. This insulation is in part provided by the removal provision, which permits the President, through his agent the Attorney General (*see* n.1, p. 3, *supra*), to remove the independent counsel from office "only for good cause, physical disability, mental incapacity, or any other condition that substantially impairs the performance of such independent counsel's duties," 28 U.S.C. § 596(a)(1).

In this context, any claim that a "good cause" removal provision deprives the President of the ability to "faithfully execute" the law proceeds by assuming its conclusion. Here, the law to be executed was enacted by Congress. The removal provision is an integral part of a statutory scheme that Congress crafted to further what Congress believed to be the public good. In connection with this statute, the President's "faithful execution" obligation requires him to assure that the will of Congress as expressed in the statute is carried out. If it is the will of Congress that, for reasons of insulation from short-term political pressures, the officer charged with responsibility for carrying out a particular statutory mandate be removable only for "good cause," then the President would discharge his responsibility to "faithfully execute" the law by observing this limitation on his power of removal. An ability to remove this officer at will is not necessary to—and indeed would be inconsistent with—

the faithful execution of this statute, as Congress wrote the enactment and as the President signed the Act into law.

By definition, moreover, a statutory removal standard of the type here does *not* diminish the President's ability to assure that an executive officer properly executes the substance of a statutory mandate. The President may accomplish removal of the officer here if for any reason the officer's performance of the executive function is "substantially impaired." The President thus retains sufficient control to assure "faithful execution" of the law the officer has been appointed to execute.

Similarly, the "good cause" aspect of the removal provision here cannot be said to effect an unconstitutional fragmentation of the executive power. This Court has not had occasion to define the minimal level of control the President must have over executive officers to effectuate the concept of a unitary executive. Presumably, however, if the President were deprived of all power to remove an executive officer, there would be an unconstitutional fragmentation of executive power.[2] And, beyond that, Professor Strauss has stated what seems to be the practical essence of the concept:

> The unitary responsibility thus expressed, and sharply intended does not admit relationships in which the President is permitted so little capacity to engage in oversight that the public could no longer rationally

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[2] Some accountability would exist even in the absence of any power to remove. See Art. II, § 2 (the President "may require the Opinion, in writing, of the principal Officer in each of the executive Departments"). In this connection, it has been pointed out that the fact that the Framers found it necessary to spell out this right to obtain written opinions seems inconsistent with the understanding that the President would always have the right to remove such officers at will. See Corwin, *Tenure of Office and the Remand Power Under the Constitution*, 27 Colum. L. Rev. 353, 397 n.102 (1927).

> believe in that responsibility. The charge to "take care [that the laws be faithfully executed"] implies that congressional structuring must in some sense admit of his doing so. An effort, then, to establish an agency over which the President's control went no further than the power to appoint its heads should be found deficient. [84 Colum. L. Rev. at 648-649: *see also id.* at 640-643.]

To determine whether the degree of presidential control is sufficient to meet this test, the first question is: for what is the President to be held ultimately accountable? In our view, where the administration and elaboration of a federal enactment is at stake, the responsibility of the President is plainly and simply for execution of the law Congress has passed and not for crafting a law the President wishes to execute.

The "good cause" standard leaves the President ample authority to assure that the executive officer here is competently performing her statutory responsibilities in the manner the statute provides. And, in carrying out a congressional enactment, competent execution according to Congress' will is the nature of the task given to the Executive Branch. In this instance, then, the "good cause" limitation on the removal leaves the President in a position of full accountability for the task given to the Executive Branch, and leaves the Congress in a position of full accountability for the wisdom or the lack of wisdom of the statute Congress has passed.

This understanding of the respective responsibilities of Congress and the President is at the heart of our constitutional system. It is in the nature of the constitutional scheme that to a great extent "the executive power" is defined and limited, both in substance and procedure, by statutes enacted by Congress. See Strauss, *supra*. The laws that the President is to "faithfully execute" are for the most part laws adopted by Congress. By and large statutes enacted by Congress define the substantive standards the President has the obligation to implement and often prescribe the procedures the Executive is to follow in performing that duty. The offices and resources at the President's disposal in carrying out the congressional will are similarly provided and organized pursuant to congressionally enacted laws. Thus, the President's role in executing the laws is primarily dedicated to carrying out the will of Congress as expressed in statutory enactments.

The principles we have followed in analyzing the instant case are no different than those that have always been accepted as applicable to the President's power to appoint officers of the United States; a power, unlike the "power of removal," that is *expressly* conferred upon the President by the Constitution. Art. II, § 2. cl. 2. As is the case with the question of removals, the Constitution is silent as to whether Congress may prescribe by statute standards governing the appointment of executive officers. But there is no doubt that Congress has that power.

It is Congress—not the Constitution—that creates the offices, and it has been unquestioned from the outset that Congress may establish by statute, not only the substantive duties of executive officers, but also the qualifications for appointment to the various offices the President has the authority to fill, the terms of such offices, the salaries of such offices, and other conditions and incidents of the appointment process. As James Madison stated in the course of the now-famous debate over "the Decision of 1789," the "Legislature creates the office, defines the powers, limits its du ation and annexes a compensation." 1 Annals of Cong. 581, quoted in *Myers*, 272 U.S. at 128-129. *See also*, *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803); Monaghan, *Marbury and the Administrative State*, 83 Colum. L. Rev. 1 (1983). The adoption of legislative standards governing removal from executive offices of the type before the Court in the instant case is, we believe, analytically indistinguishable from the

adoption of legislative standards to govern the appointment power:

> Until Congress has acted there is no office to which there may be appointment or from which there may be removal. Everybody concedes . . . that Congress may stipulate the qualifications of appointees, short of designating a specific eligible, although the power of appointment is thereby curtailed. What, then, is to prevent Congress from fixing the tenure of an office created by it with resultant curtailment of the removal power? So far as the principle of the separation of powers is concerned the two things stand on precisely the same footing, while in practice they may be but different phases of the same thing, since security in office may be the *sine qua non* of the kind of behavior which an office requires for the successful discharge of its characteristic duties. [Corwin, *Tenure of Office and the Removal Power Under the Constitution*, 27 Colum. L. Rev. 353, 386 (1927).][3]

c. So far in this brief, we have focused exclusively on legislative standards for the removal of executive officers whose sole responsibility is to execute a particular statutory mandate. In that context, as we have shown, a "good cause" standard is not in any respect in tension with the principles underlying Article II. The officer at issue in this case, and the other executive officers as to whom Congress has adopted standards for removal (see *infra* at 20 & n.8), all fall into this category. For the disposition of this case, it is unnecessary to carry the analysis further. But, to place the issue in perspective, it is important to recognize that other executive officers have duties of a different nature and stand in a different relationship to the President.

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[3] We note that since it is well settled that the express appointment power is subject to legislative definition, the often repeated suggestion that a removal power can be implied from the appointments clause does nothing to advance the resolution of the issue we address in this brief.

The Secretaries of State and Defense, for example, are charged, *inter alia*, with assisting the President in the execution of powers that derive not from any statutory mandate but from an express conferral of power upon the President by the Constitution. And these and other cabinet officers and White House officials generally stand in a relationship of confidential advisor to the President. *Cf. United States v. Nixon*, 418 U.S. 683, 703 (1974). In circumstances such as these, limitations on the President's ability to remove may be inconsistent with the Article II principles that we have discussed. *See* Corwin, *supra*, 27 Colum. L. Rev. at 392-394; Nathanson, *Separation of Powers and Administrative Law: Delegation, Legislative Veto, and the "Independent Agencies,"* 75 N.W.U.L. Rev. 1064, 1099-1109 (1981). *See also Bowsher*, 106 S.Ct. at 3207 (White, J., dissenting) ("[T]here are undoubtedly executive functions that, regardless of the enactments of Congress, must be performed by officers subject to removal at will by the President").

Because some executive offices may combine the attributes just discussed with responsibilities for executing particular statutory mandates, it may be difficult to define with precision the category of executive officers as to whom Article II requires that the President retain the ability to remove at will. There is no occasion in this case to undertake that task, for here, as we have discussed, the sole responsibility of the officer in question is to execute a particular statutory mandate. As to such an officer, nothing in Article II overrides the authority of Congress pursuant to the necessary and proper clause of Article I to adopt a "good cause" limitation on the President's removal power.

2. *This Court's Decisions.* This Court's decisions have not definitively treated the question of the circumstances in which Congress may legislate standards governing the President's ability to remove an executive officer. But the

general thrust of this Court's opinions is entirely consistent with the textual analysis of the Constitution set forth above.

Myers was the first case to address the question of the President's removal power. The issue in *Myers* was *not*, however, whether Congress may prescribe by statute standards that govern removal by the President. The statute at issue in *Myers* did not purport to set any standards governing removal. Rather, that statute provided for Congress' *participation* in the actual removal decision by means of the advice and consent procedure. The issue thus raised, like the issue in *Bowsher*, was the propriety of direct congressional involvement in the process for removing an officer charged with execution of the laws. And, the *Myers* Court, like the *Bowsher* Court, found such involvement to be unconstitutional. There are, to be sure, broad *dicta* in *Myers* suggesting that Congress may not establish standards limiting the President's removal powers. These *dicta* are, however, unsupported by the constitutional materials cited in *Myers*.[4] Particularly because that is so, the best reading of that decision is the one suggested by Professor Strauss:

> *Myers* can readily be limited to the issue presented by the provision for senatorial concurrence in removal, the Tenure of Office Act problem. Although the *Myers* Court talked at times as if it regarded the use of fixed terms of office and "for cause" requirements to restrict the President's removal authority as equally difficult, that equation is not convincing. Reservation of senatorial approval for removals suggests political power struggles between President and Senate that are not connoted by a judgment that fixed tenure in office, with limitations on discharge, will be useful for the ends of public policy. [84 Colum. L. Rev. at 614 (footnote omitted); *see generally*, Corwin, *supra*, 27 Colum. L. Rev. 353.] [5]

This Court's opinion in *Bowsher*, it seems to us, reads *Myers* in this limited fashion. The *Bowsher* Court described *Myers*' holding as follows: the *Myers* Court held "the statute unconstitutional on the ground that for Congress to 'draw to itself, or to either branch of it, the power to remove or the right to participate in the exercise of that power . . . would be . . . to infringe the constitutional principle of separation of governmental powers.'" 106 S.Ct. 3188 (quoting 272 U.S. at 161). The *Bowsher* Court also stated: "*Humphrey's Executor* [*v. United States*, 295 U.S. 602 (1935)] involved an issue not presented either in the *Myers* case or in [*Bowsher*]—*i.e.*, the power of Congress to limit the President's powers of removal of" an executive officer. 106 S.Ct. at 3188. And, consistent with the same understanding, *Humphrey's Executor*, decided 10 years after *Myers*, upheld a statute permitting the President to remove Federal Trade Commissioners only "for inefficiency, neglect of duty, or mal-

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[4] The *Myers* court relied heavily on the debate over the "Decision of 1978." That debate was addressed to the question whether Congress could *participate* in the removal process, and not to the question whether Congress could set standards that govern removal by the President. Thus, the opinion in *Myers* describes the issue debated in 1789 as follows:

> It is very clear from this history that the exact question which the House voted upon was whether it should recognize and declare the *power of the President under the Constitution to remove* the Secretary of Foreign Affairs *without the advice and consent of the Senate*. That was what the vote was taken for. [272 U.S. at 114 (emphasis added); see also *Ex Parte Hennen*, 38 U.S. (13 Pet.) 230, 259 (1839).]

And, not surprisingly, statements throughout the debate focused on the issue thus defined.

[5] Indeed, the Solicitor General's brief and oral argument in *Myers* conceded "that the power of removal may be subject to such general laws as do not destroy the exercise by the President of his power of removal, and which leaves to him the exercise of the power subject to such general laws as may fairly measure the standard of public service." Substitute Brief for United States on Reargument in No. 2, O.T. 1926, p. 9 (cited in *Bowsher*, 106 S.Ct. at 3196 n.4 (Stevens, J., concurring)).

feasance in office." 295 U.S. at 620. This holding establishes that functionally related removal restrictions need not threaten "the equilibrium [between President and Congress] established by our constitutional system." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 638 (1952) (Jackson, J., concurring). See also *Weiner v. United States*, 357 U.S. 349 (1958).

We would be less than candid if we did not admit that in articulating the distinction between its holding and what was said in *Myers*, the *Humphrey's Executor* Court adopted a line of reasoning that is less than satisfactory. Thus, *Humphrey's Executor* limited the *dicta* in *Myers*—that the President has an illimitable power of removal—"to include [only] all purely executive officers." 295 U.S. at 627-628. And, the opinion then defined commissioners of the Federal Trade Commission out of that category by characterizing their functions as "quasi-legislative or quasi-judicial powers" and by characterizing the FTC "as an agency of the legislative or judicial department of the government." *Id.* at 628.

Such characterizations obscure rather than illuminate analysis. If there is a core executive branch activity, it is carrying out the objectives of duly enacted statutes. It is, of course, often possible to characterize the responsibilities placed on executive officers in conducting such executive activity as in the nature of a "legislative" or "judicial" task. Any authority delegated by Congress respecting determinations that make a general rule concrete in a particular instance and that Congress might have made itself could be termed in the nature of a legislative authority, or because the delegee is to determine what the general rule means could be termed in the nature of a judicial authority. But such characterizations have no meaning in the present context. However characterized, these activities must be performed by executive officers who have some continuing accountability to the President, otherwise the task of statutory implementation would be

performed wholly outside the political structure of our government. Regardless of the nature of the executive activity, the constitutional concerns that must be met are those described in part 1, *supra*.

This is not to say that phrases such as "quasi-legislative" or "quasi-judicial," while inexact, are not suggestive of situations where Congress may appropriately enact standards governing the President's ability to remove. These phrases are usually associated with circumstances where Congress might properly find good reason for insulating an executive officer from at-will removal by the President, and where the nature of the officer's responsibilities are such that a "good cause" removal provision would not be at odds with Article II's requirements that the executive power is to be vested in a unitary executive who may be held accountable for "faithful execution" of the laws. However, the limitations on at-will removals in such situations are constitutional not because the officers are "quasi-legislative" or "quasi-judicial," but because these constitutional requirements are satisfied. If these requirements may be satisfied in cases of removal limitations for executive officers who are not "quasi-legislative" or "quasi-judicial," then those limitations too should be found consistant with the Constitution.[6]

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[6] *See Bowsher*, 106 S.Ct. at 3207 n.3 (White, J., dissenting):

> Although the Court in *Humphrey's Executor* characterized the powers of the Federal Trade Commissioner whose tenure was at issue as "quasi-legislative" and "quasi-judicial," it is clear that the FTC's power to enforce and give content to the Federal Trade Commission Act's proscription of "unfair" acts and practices and methods of competition is in fact "executive" in the same sense as is the Comptroller's authority under Gramm-Rudman—that is, it involves the implementation, (or the interpretation and application) of an act of Congress. Thus, although the Court in *Humphrey's Executor* found the use of the labels "quasi-legislative" and "quasi-judicial" helpful in "distinguishing" its then-recent decision in *Myers v. United States*, 272 U.S. 52, (1926), these terms are hardly of

Since *Humphrey's Executor*, this Court has moved away from reliance on the characterizations used in that case and toward a method of stating its analysis that more clearly expresses the operative constitutional principles. Thus, in *Buckley v. Valeo*, 424 U.S. 1, 140-141 (1976), the Court recognized that regardless of the labels that might be applied, functions of the type performed by the commissioners in *Humphrey's Executor* must be considered to be within the domain of the Executive Branch:

> All aspects of the [Federal Election Campaign] Act are brought within the [Federal Election] Commission's broad administrative powers: rulemaking, advisory opinions, and determinations of eligibility for funds and even for federal elective office itself. These functions, exercised free from day-to-day supervision of either Congress or the Executive Branch are more legislative and judicial in nature than are the Commission's enforcement powers, and are of kinds usually performed by independent regulatory agencies or by some department in the Executive Branch under the direction of an Act of Congress. Congress viewed these broad powers as essential to effective and impartial administration of the entire substantive framework of the Act. *Yet each of these functions also represents the performance of a significant governmental duty exercised pursuant to a public law.* While the President may not insist that such functions be delegated to an appointee of his removable at will, *Humphrey's Executor v. United States*, 295 U.S. 602 (1935), none of them operates merely in aid of congressional authority to legislate or is sufficiently removed from the administration

any use in limiting the holding of the case; as Justice Jackson pointed out, "[t]he mere retreat to the qualifying "quasi" is implicit with confession that all recognized classifications have broken down, and "quasi" is a smooth cover which we draw over our confusion as we might use a counterpane to conceal a disordered bed." *FTC v. Ruberoid Co.*, 343 U.S. 470, 487-488, 72 S.Ct. 800, 810 96 L.Ed. 1081 [1952] (Jackson, J., dissenting).

> and enforcement of public law to allow it to be performed by the present Commission. These administrative functions may therefore be exercised only by persons who are "Officers of the United States." [Emphasis added; footnotes omitted.]

Then, in *Nixon v. Administrator of General Services*, 433 U.S. 425, 443 (1977), the Court adopted a general test for use in separation of powers cases, which, unlike the "quasi-legislative" and "quasi-judicial" test, is fully responsive to the pertinent constitutional concerns:

> [I]n determining whether the Act disrupts the proper balance between the coordinate branches, the proper inquiry focuses on the extent to which it prevents the Executive Branch from accomplishing its constitutionally assigned functions.

Under this test, the constitutionality of a statute limiting presidential removals from office would turn on application of the principles discussed in part 1, *supra*.[7] We submit that the same mode of analysis should be applied here. And, as we showed in part 1, under that analysis the "good cause" removal provision here at issue does not violate the Constitution.

3. *Practical Implications of the Ruling of the Court Below.* Although the statute under consideration in this case is unique in a number of ways, that statute is far from unique in its provision of a "good cause" limitation on the President's ability to make removal. It has become a tenet of our modern government that various law execu-

[7] In *Bowsher*, only Justice White, in his dissenting opinion, reached the issue whether " 'executive' powers of the sort granted the Comptroller by the Act may only be exercised by officers removable at will by the President." 106 S.Ct. at 3206. Justice White made that determination based on the above-quoted standard from *Nixon v. Administrator of General Services*. *Id.* at 3207. In applying that standard—and finding that the "good cause" removal standard in that case was consistent with the requirements of Article II—Justice White looked to the kinds of factors discussed in part 1, *supra*.

tion functions may be best conducted—and may be conducted with the highest level of public confidence—by officers who are insulated, at least to some degree, from short term political influences. In large part, the mechanism that Congress has chosen to accomplish this insulation has been the enactment of statutory limitations on the President's ability to remove. *See Humphrey's Executor*; *Weiner v. United States*. Based on precisely the kinds of policy judgments that the Constitution grants Congress the authority to make, Congress has on myriad occasions established executive offices to enforce statutory commands and has placed restrictions on the President's powers to remove the office-holder without good cause.

Thus, for example, the members of the Board of Governors of the Federal Reserve System are appointed for fourteen-year terms "unless sooner removed for cause by the President." 12 U.S.C. § 242. Members of the Federal Trade Commission, 15 U.S.C. § 41, the Nuclear Regulatory Commission, 42 U.S.C. 5841(e), the Federal Energy Regulatory Commission, 42 U.S.C. § 7171(b), and the Interstate Commerce Commission, 49 U.S.C. § 10301, all serve for specified terms with the protection that the President may only remove them "for inefficiency, neglect of duty, or malfeasance in office." And, the National Labor Relations Board's members each enjoy both substantive and procedural protections: "Any member of the Board may be removed by the President, upon notice and hearing, for neglect of duty or malfeasance in office, but for no other cause." 29 U.S.C. § 153(a).[8]

[8] For further examples of similar restrictions on the President's removal power—reflecting the wide variety of executive branch contexts in which Congress has over the years enacted such restrictions—*see, e.g.*, 5 U.S.C. § 1202(d) (Members of the Merit Systems Protection Board); 5 U.S.C. § 1204 (Special Counsel for the Merit Systems Protection Board); 5 U.S.C. § 7104(b) (Members of the Federal Labor Relations Authority); 12 U.S.C. § 3013(a) (Board of Directors of National Consumer Cooperative Bank); 15 U.S.C. § 2053(a) (Members of the Consumer Product Safety Commission); 39 U.S.C. 3601(a) (Members of the Postal Rate Commission); 42 U.S.C. § 8718(a)(4) (Inspector General of the Synthetic Fuels Corporation). Many more examples could be cited.

These examples manifest a serious effort by Congress, in a variety of contexts, both to address the need in certain circumstances for executive branch decision-makers to be able to pursue their mandates to enforce statutory law insulated from immediate political influences, and to respect the powers and prerogatives of the President. The court of appeals' decision that the "good cause" provision of the Ethics in Government Act violates the Constitution calls into question many of these long-standing, well-established governmental arrangements. The reasons offered by the court below to justify the conclusion that Congress may not constitutionally limit the President's power to remove an independent counsel apply with equal force to many other executive offices with respect to which Congress has established removal restrictions, including the very office for which this Court has unanimously upheld removal restrictions: the office of FTC commissioner. *See Humphrey's Executor.*

The court below began from the premise that under *Humphrey's Executor* the courts are required to distinguish between "quasi-legislative" and "quasi-judicial" officers on the one hand, and "purely executive officers" on the other, with *Myers* establishing "an absolute prohibition on any restriction of the President's power to remove a purely executive officer." Pet. App. 45a-46a. Although, in the years since the *Humphrey's Executor* decision, this Court has made clear that the offices for which Congress is entitled to mandate removal limits exist within the Executive Branch, *see, e.g., Buckley v. Valeo*, 424 U.S. at 140-141, the court below went on to define the class of "purely executive officers" as potentially encompassing virtually the entire Executive Branch:

> [I]nterpreting a law enacted by Congress to implement the legislative mandate is the very essence of

> "execution of the law" and the exercise of judgment "concerning facts that affect the application of the [law]" is another characteristic of the executive function . . . . The independent counsel is a fortiori an executive officer under this definition. She must determine whether facts uncovered in her investigation may constitute illegal conduct; in order to make this judgment, she must "interpret[] a law enacted by Congress. [Pet. App. 50a (quoting *Bowsher v. Synar*, 106 S.Ct. at 3192).]

By this definition such officers as the members of the Board of Governors of the Federal Reserve System, the Federal Trade Commission, the Nuclear Regulatory Commission, the Federal Energy Regulatory Commission, the Interstate Commerce Commission, and the National Labor Relations Board (as well as officers of other of what we have come to know as independent regulatory agencies); would be deemed "purely executive" officers and thus would be subject, as a matter of constitutional law, to at-will removal by the President. In each instance, those officers are charged with the task of "[i]nterpreting a law enacted by Congress to implement the legislative mandate" and "exercis[ing] judgment concerning facts that affect the application of the [law]."

This outcome is not surprising since the standard used by the court below to define the set of offices as to which removal limits are impermissible is, in fact, taken from *Bowsher*'s description of the overall function of the Executive Branch. *See* 106 S.Ct. at 3192 ("Interpreting a law enacted by Congress to implement the legislative mandate is the very essence of 'execution' of the law"). But the question is not whether these officers are part of the Executive Branch. That much is by now beyond dispute. The question is whether Congress may adopt "good cause" limitations on the President's ability to remove these officers. As we showed in part 1, *supra*, the standard employed by the court below is not addressed to the constitutional considerations that should govern the answer to that question.

To bolster its conclusion, the court below went on to assert that "the core executive nature of the prosecutorial function" mandated that a prosecutor be classified as a "pure[ly] executive officer" to ensure that "the President retain the power to remove core executive officers at will." Pet. App. 50a-51a. Again, numerous federal officers and agencies long-governed by "good cause" removal restrictions play prosecutorial roles in the enforcement of federal statutes. *See, e.g.*, 15 U.S.C. § 45(m) (FTC has authority to prosecute actions for civil penalties for unfair methods of competition); 15 U.S.C. §§ 2061, 2071, 2076(7)(A) (Consumer Product Safety Commission has authority to prosecute actions for injunctive enforcement of Act and seizure of hazardous products); *see also Heckler v. Chaney*, 470 U.S. 821, 832 (1985) (generally describing agency enforcement and non-enforcement decisions as involving the discretionary use of coercive force and thus analogous to the exercising of traditional prosecutorial discretion). More important, the court below provides no principled basis for exempting offices with prosecutorial functions in particular from congressionally mandated removal restrictions. Nothing in the principles of Article II, discussed in part 1, *supra*, provides the basis for such a distinction. The court below simply asserted that this is a "core domain[] of presidential responsibility" and thus must be within the President's unrestricted power of removal. Pet. App. 53a.[9]

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[9] The opinion below does seek to distinguish traditional agency enforcement powers from the independent counsel's powers on the basis that agencies like the FTC are "part and parcel of the very statutes [the agencies were] assigned to enforce," while the independent counsel only has the authority to enforce "pre-existing" laws. Pet. App. 49a-50a. Once again, the opinion does not explain why the asserted distinction should have any constitutional significance. In any case, however, the distinction is inaccurate: for example, the FTC as well as other agencies have authority to enforce federal antitrust laws, which are certainly "pre-existing" laws rather than the laws under which these agencies were established. 15 U.S.C. § 21 (authorizing Interstate Commerce Commission, Federal Com-

In sum, the distinctions drawn by the court of appeals are derived neither from significant differences between independent counsels and the myriad other executive officers traditionally governed by removal restrictions, nor from any principles stated in Article II. If that court's reasoning is sufficient to invalidate the independent counsel law, its separation of powers theory will not be easily cabined, and myriad federal statutes will be called into doubt.

This Court should not readily imply principles from the Constitution that work such a consequence. Indeed, in cases like this one, that caution is implicit in the constitutional scheme. As we have discussed, Congress has in a variety of contexts made a serious effort to address the inherent tension between the need in some circumstances for decision-makers who are insulated from immediate political influences and the need for a politically accountable Chief Executive. And it is the *political branches*, working through the legislative process, that the Framers intended would be responsible for working out solutions to these sorts of structural dilemmas. The Federalist No. 51 (J. Cooke, ed. 1961) (Madison). The Constitution provides directly for the three institutions at the apex of the federal government—the Congress, the President, and the Supreme Court, and

> "[t]he remainder of government was left undefined, in the expectation that congressional judgments about appropriate structure would serve so long as they observed the two prescriptive judgments embodied in the Constitution: that the work of law-administration be under the supervision of a unitary, politically accountable chief executive; and that the structures chosen permit, even encourage, the continuation of rivalries and tensions among the three named heads of government, in order that no one

munications Commission, Board of Governors of the Federal Reserve System and Federal Trade Commission to enforce antitrust laws).

> body become irreversibly dominant and thus threaten to deprive the people themselves of their voice and control.
>
> [This] judgment leaves Congress free in particular cases to choose among a variety of relationships the President might have with those who actually do the work of law-administration . . . . [Strauss, *supra*, 84 Colum. L. Rev. at 667.]

Congress in enacting "good cause" removal standards is operating wholly within the legislative sphere. There may be ample room for debate over whether these congressional judgments have been wise or unwise. There is, however, no reasonable basis for the argument that Congress' efforts in this regard to promote the disinterested and principled execution of the laws are threats to the structure of our system of government. In this context, the Constitution and original materials leave no doubt that the political branches are accorded a broad area of freedom within which to reach *any* of a multitude of practical arrangements in working out the structure of the government and to vary those arrangements from time to time based on experience. The Federalist No. 51, *supra*. This Court should be slow to limit that freedom through a set of rules drawn out of the Constitution by the delicate—and hazardous—process of implication.

CONCLUSION

For the foregoing reasons, on the issue addressed in this brief the decision of the Court of Appeals should not be upheld.

Respectfully submitted,

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